IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 248 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HEMESH FAMILY TRUST - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR for Applicant(s) : 1,
MR TANVISH U BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 29/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Mr. SN Soparkar, learned counsel assisted by Ms. Vaibhavi Parikh, learned counsel for the assessee. Mr. Tanvish U. Bhatt, learned counsel for the Revenue. Parties are heard.

2. At the instance of the assessee, the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has made this Reference for opinion of this Court in relation to Income Tax Appeals No. 2682, 2682 and 2684/Ahd/1990 on the following question;

> 'Whether on the facts and in the circumstances of the case the tribunal was justified in holding that no valid trust came into existence on the basis of alleged deed Dt. 20.4.82/20.9.82 and the assessed income as computed by the ITC should be subject to tax at rates as applicable to A.O.P. Under the Act ?'

3. It is to be noted that Reference Application No. 1465/Ahd/1994, 1466/Ahd/1994 and Reference Application No. 1467/Ahd/1994 were made by the concerned assessee for referring various questions. Reference Applications were heard and ultimately in relation to 8 questions proposed in the abovereferred 3 applications, one single question, as referred to above, has been referred to this Court for

opinion.

4. The facts, in nutshell, for disposal of the present Reference, are that one Ishwardas Gordhandas Patel, resident of 4/A, Shivalaya, Chembur, Bombay, executed a Deed of Settlement on 20th April 1982 on two non-judicial stamp papers of Rs. 60 bearing No. 467 and another of value of Rs. 40 bearing No. 466 purchased by Shivalaya Construction Co., on 5th July 1982. A submission was made by the assessee, placing reliance upon the Trust Deed that by the Deed of Settlement a sum of Rs. 1000/- was transferred to 3 persons, namely (1) Bhagwandas Gordhandas Gujarati, resident of Pune, (2) Purshottamdas Bhikhabhai Patel of Dholka, and (3) Smt. Kalindi Jayantilal Patel of Dholka as trustees to hold the said sum for the benefit of three beneficiaries who were mentioned in clause (2) of the said Deed of Settlement, namely (1) Hemesh, son of Navnit Kanaiyalal Patel, (2) Pinakin, son of Bhagwandas Gordhandas Gujarati, and (3) Amrish, son of Bhagwandas Gordhandas Gujarati. Various arguments were raised before the Assessing Officer that as the Trust had come into existence, the Trust was required to be assessed. The Assessing Officer, recording salient features in the matter, observed that the Trust Deed in fact was sham and bogus and was concocted. He decided the matter against the interests of the assessee and opened the penalty

proceedings. The order, not being palatable to the assessee, was challenged at his instance before the C.I.T. (Appeals). The C.I.T. (Appeals) called for Remand Report from the Assessing Officer as per his order dated 6.10.1986. The Remand Report was received by the C.I.T. (Appeals) vide Assessing Officer's letter dated 20.1.1990, the Report was against the interests of the assessee. The Commissioner of Income Tax (Appeals), after hearing the parties and not agreeing with the Remand Report, observed that there was an arithmatical/clerical mistake in mentioning the date of execution of the document as '20th April 1982' because in fact the document was executed on 20th September 1982'. He also observed that the attending circumstances like minutes book recorded and cash book opened by the assessee, the opening of the Bank account and registration under the Sales Tax Act which were after 20th September 1982 would show that the Trust Deed was executed and signed on 20th September 1982. He accordingly allowed the Appeals. The Revenue, being dissatisfied with the order, preferred Appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, after hearing the parties and after recording the arguments which were raised by the parties, observed that the C.I.T. (Appeals) was unnecessarily influenced by the submissions made by the assessee. It observed that the Trust Deed was sham and bogus, it could not be executed on 20th April

1982 on a stamp purchased on 5th July 1982, that too especially when the stamp was purchased in the name of M/s. Shivalaya Construction Co., there were difference in the signatures, and there was a serious dispute about the place of execution of the document. It accordingly allowed the Appeals and held that the Assessing Officer was justified in disowning and disregarding the Trust Deed. The assessee, thereafter, made various applications for Reference. Referring to Question No.1 in Reference Application No. 1465/Ahd/1994, Mr. Soparkar submitted that number of questions, which were considered by the Income Tax Appellate Tribunal, were not raised by the parties and no opportunity was afforded to the assessee to meet with the submissions. It is also the case of the assessee that the legal effect of purchase of the stamp in name of some one else and difference in place of execution/attestation, or difference in the signatures and execution of the document on a date prior to the date of the purchase of the stamps were in fact not argued. He submits that the Income Tax Appellate Tribunal was absolutely unjustified and from the frame of the question proposed by the assessee it would clearly appear that the assessee allthroughout had been contending that he was condemned unheard. On the other hand, learned counsel for the Revenue submits that from a perusal of the order passed by the Income Tax Appellate Tribunal and Paragraph 7 of the Statement of the Case

made by the Tribunal it would clearly appear that not only the questions were raised and argued by the Revenue but those were properly replied by the learned counsel for the assessee. He submits that the Tribunal was justified in restoring the order passed by the Assessing Officer. We have heard the parties at length and have perused the Reference.

5. It would be trite to say that if a statement is recorded by the Tribunal in its order or judgment or proceedings, then that would be taken to be correct unless the person aggrieved by such report makes an application and files an affidavit of the counsel who have appeared in the matter or the party who was present in person contending that such statements which have become part of the proceedings etc., are wrong and bad and in fact were wrong statements if not misstatements. In the present matter, immediately after Tribunal had made its order, such an affidavit or an application was not submitted. Under the circumstances, it will have to be presumed that the statements made in the final order of the Income Tax Appellate Tribunal were not incorrect or were not misstatements of the Tribunal.

6. Assuming that the Reference Application which had raised all these issues and had made allegations of

wrong statements in the order could be taken to be a statement by the party or by the Counsel, then it was imperative upon the party or the Counsel to file an affidavit after the Reference was made in view of the statement recorded in Paragraph 7 onwards of the Statement of the Case. Paragraph 7 onwards, of the Statement of the Case, is verbatim reproduction of the order passed by the Income Tax Appellate Tribunal. If on two available opportunities such affidavit is not filed, then it will have to be presumed that the assessee was not aggrieved by or was not taking an exception to the record of the case. Under the circumstances, the Question No.1 proposed in Reference Application No. 1465/Ahd/1994 may come within the sweep of the final questions, but will have to be answered against the interests of the assessee.

7. The Assessing Officer, so also the Tribunal, to hold that the Trust Deed was sham and bogus and was ante-dated, have relied upon certain facts which are as follows;

(1) The Stamp paper was purchased in the name of M/s. Shivalaya Construction Company;

(2) The document is alleged to be executed on 20th September 1982 but it bears the date of 20-4-1982;

(3) The stamp papers used are dated 5th July

1982;

(4) Contrary to the provisions of the Bombay Stamp Act, the stamps which were purchased in Maharashtra were used in Gujarat. No stamp duty has been paid to the Government of Gujarat.

(5) Variance in the signatures of the trustee, the document is alleged to have been executed at Ahmedabad but it bears the endorsement otherwise that the signature were affixed at Dholka.

8. Shri Soparkar, learned counsel for the assessee submits that the assessee was not to be benefitted by ante-dating the document and the circumstances which were within the reach of the assessee have been submitted by him before the authorities. He submits that the cash book was opened on 20th September 1982, the trustees had recorded the Minutes after 20th September, the sales-tax registration was obtained after 20th September 1982, and the Bank accounts were also opened after 20th September 1982. His submission is that if every action is taken by the Trust after 20th September 1982, then these facts if are taken in juxtaposition would lead to irresistible conclusion that the Trust Deed was executed on 20th September 1982 and there was some typographical, arithmatical or clerical error in putting the date as '20th April 1982'.

9. Shri Bhatt, learned counsel for the Revenue, on the other hand, submits that these circumstances would fall short to discharge the burden which was very heavy upon the assessee. According to him, the date of the document is 20th April 1982, but the stamp was purchased on 5th July 1982. He submits that if on comparison of the attending circumstances the Tribunal has recorded a finding then that would be a finding of fact and in any case this Court would not be entitled to reverse the findings unless the findings are perverse or such which could not be arrived at by a prudent person.

10. We have gone through the order passed by the Tribunal. We have also gone through the order passed by the learned Commissioner of Income Tax (Appeals).

11. The Tribunal, in its detailed order, has referred to every question raised by the parties. Not only that, it has referred to each and every circumstance which related to execution of document, its trustees,and the reasons which persuaded the Tribunal not to rely upon the document.

12. When we had asked Mr. Soparkar as to how the stamps purchased by M/s. Shivalaya Construction Company came in hands of the settlor, Mr. Soparkar submitted that

the present settlor was an employee with M/s. Shivalaya Construction Company, therefore he could obtain the stamp and use it to his benefit. The explanation is bad. An employee could not use or utilise the stamps purchased by his master. In the present case, the master has not come forward to say that he ever authorised his employee to use the stamps which were purchased for and on behalf of or by the master himself. In any case, the stamps were purchased on 5th July 1982. Any document could be detailed on such stamps after its purchase and not prior to 5th July, because prior to 5th July 1982 the stamps were not in existence. The Tribunal has considered the circumstances which are patent on the face of the records and which are latent in the body of the document. If, on comparison of the circumstances floating on the surface of the records and the explanation offered by the assessee, the Tribunal has recorded a finding of fact that the document does not inspire the confidence, then the Tribunal was justified in rejecting the document.

13. For the reasons aforesaid and for the reasons given in the order passed by the Tribunal, we are unable to hold that the Tribunal was unjustified in deciding the matter against the interests of the assessee.

14. The question is answered against the interests of the assessee and in favour of the Revenue. The Reference

stands disposed of. No costs.

[R.S. Garg, J.]

rmr. [M.R. Shah, J.]